Filed 6/22/05

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. ABEL BANUELOS, Defendant and Appellant.	2d Crim. No. B172385 (Super. Ct. No. NA058019) (Los Angeles County)

A jury convicted appellant Abel Banuelos of making a criminal threat under Penal Code section 422[1] and of resisting a peace officer under section 69. The trial court sentenced appellant to state prison after finding during a bifurcated proceeding that he had been convicted of a prior serious felony within the meaning of the Three Strikes law (§ 1170.12), which also triggered the five-year enhancement provision of section 667, subdivision (a). Appellant argues that the judgment must be reversed because (1) the evidence was insufficient to prove that he made a criminal threat; (2) the court erroneously declined jury instructions defining lawful arrest; and (3) the record was

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for partial publication. The portions of this opinion to be deleted from publication are identified as those portions between double brackets, e.g., [[/]].

[1] All statutory references are to the Penal Code.

insufficient to demonstrate that the prior conviction qualified as a serious felony. We agree with the last contention.

[[FACTS AND PROCEDURAL HISTORY

Jorge Orozco owns a small market in the Wilmington area that sells prepared food. He was working one morning with his wife and 21-year-old daughter when appellant entered the market and claimed he had been robbed. Appellant was not wearing a shirt and Orozco could see that he had gang tattoos on his body. Appellant said he was hungry but had no money, and he tried to give Orozco an identification card in exchange for some food. Orozco told appellant to leave and he eventually did so.

Appellant reentered the market about ten minutes later. This time he was wearing a shirt. He again asked for food and Orozco told his wife to give him two tamales to make him go away. Appellant wanted to eat the tamales at the inside counter, but Orozco told him to leave. Appellant took the food outside.

After another ten minutes or so, appellant returned, again not wearing a shirt. He said he was a health inspector and demanded to know whether Orozco had washed his hands before giving him the tamales. Appellant's demeanor was aggressive and he held his hands in fists in front of his chest. He asked Orozco whether he could wash his hands, but Orozco did not want him to use the sink in the kitchen area of the market because his wife was back there. Orozco told appellant he could not go into the kitchen without a shirt.

Appellant, who was much younger and larger than Orozco,[2] responded by pulling a health department sign from the wall and throwing it on the counter. He moved closer to Orozco, who told his wife to call the police. Appellant said, "The police coming [sic]. Call the police." He left the market, telling Orozco, "Come out. I'll wait for you outside." As he spoke these last words, he held one hand up in the air in a fist and waved his other arm. Orozco thought that appellant meant to beat him up if he came outside.

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[2] Orozco was 60 years old, 5 ' 7" tall, and weighed 152 pounds. Appellant was 30 years old, 5 ' 11" tall, and weighed 225 pounds.

He took the threat seriously and was concerned for his safety and that of his wife and daughter.

Police arrived and contacted appellant outside the market after interviewing Orozco. Officer Liavva Moevao and two other officers approached appellant and asked to speak to him, but appellant just swore at them. Moevao decided to do a weapons patdown and told appellant to put his arms behind his back. Appellant said, "What the fuck for?" and assumed a fighting stance while resisting Moevao's attempt to restrain his arm. Moevao and other officers restrained appellant's arm and forced him to the ground. Appellant continued to struggle and kick until he was placed in handcuffs and leg restraints. He was arrested and taken into custody.]]

DISCUSSION

[[*A. Sufficiency of the Evidence of Criminal Threats*

Section 422 is violated when (1) the defendant willfully threatens to commit a crime that will result in death or great bodily injury to a person; (2) the defendant made the threat with the specific intent that it be taken as a threat, even if there is no intent of actually carrying it out; (3) the threat was so unequivocal, unconditional, immediate and specific as to convey to the person threatened a gravity of purpose and an immediate prospect of execution of the threat; (4) the threat actually caused the person threatened to be in sustained fear for his or his immediate family's safety; and (5) the threatened person's fear was reasonable under the circumstances. (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228.) Appellant argues that the evidence was insufficient to support his conviction under this statute. We disagree.

Our standard of review on appeal is well established: we consider the entire record in the light most favorable to the judgment to determine whether substantial evidence supports the jury's verdict. Our focus is on whether any rationale trier of fact could have reached the conclusion reached by the jury, not whether we believe the in the first instance that appellant is guilty beyond a reasonable doubt. The testimony of a single witness is sufficient proof of any fact, and the standard of review is the same whether the evidence is direct or circumstantial. (*Jackson v. Virginia* (1979) 443 U.S.

307, 319; *People v. Kraft* (2000) 23 Cal.4th 978, 1053; *People v. Johnson* (1980) 26 Cal.3d 557, 576.)

The criminal threat in this case arises from appellant's final conversation with Orozco, which he ended by saying, "Come out. I'll wait for you outside." Appellant observes that a criminal threat requires a threat to kill or seriously injure the victim, and he argues that neither the statement nor his contemporaneous actions conveyed a sufficiently serious threat. We are not persuaded. Although appellant did not expressly threaten death or great bodily injury, the jury was free to consider both the content of the statement and its surrounding circumstances, including the manner in which it was made. (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 860.) The evidence showed that when appellant made the statements that are the basis for his conviction, he did so with clenched fists and an angry demeanor, following a bizarre exchange in which he essentially coerced Orozco into giving him free food. Appellant was much younger and larger than appellant, and he had visible gang tattoos which would be intimidating to a person who, like Orozco, knew what they signified. The jury could reasonably find that in context, appellant's invitation to "come out," along with his promise that he would be waiting, was a threat to fight Orozco. Given the disparity in their age and size, the jury could also conclude that a threat to fight was the equivalent of a threat to inflict great bodily injury.

Appellant suggests the threat was not so "unequivocal, unconditional, immediate, and specific" as to convey a gravity of purpose and an immediate prospect of execution. We disagree. Appellant communicated to Orozco that he would be waiting outside to fight with him, and he walked outside immediately after making this statement. He knew where Orozco worked and could have returned at any time. A rational trier of fact could reasonably find that the threat was both serious and immediate.

We do not agree with appellant's claim that there is no evidence he specifically intended for Orozco to take his words as a threat. Whether or not appellant intended to actually fight Orozco, the jury could readily infer that that appellant intended to convey that message to him.

Finally, appellant argues there was no proof Orozco was in sustained fear, as required by section 422. "Sustained" for this purpose means a "period of time that extends beyond what is momentary, fleeting or transitory." (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156.) Orozco testified that after appellant said he would be waiting outside, Orozco believed appellant was going to "beat him up." He was also worried about his family. Considering appellant's hostile and erratic behavior, his apparent gang affiliation and his larger physique, these were not unreasonable fears. Although the police officers responded shortly after the 911 call was placed by Orozco's wife, a lengthy period of worry is not necessary to constitute sustained fear. (See *ibid*. [15 minutes "more than sufficient"].) The jury could reasonably conclude that Orozco's fear was more than "momentary, fleeting or transitory."

B. Failure to Instruct on Lawful Arrest

Appellant argues that the trial court committed prejudicial error when it rejected his request for jury instructions defining lawful arrest. (See CALJIC Nos. 9.24 & 9.25.) He argues that the instructions were necessary because he was entitled to an acquittal on the charge of resisting an officer under section 69 if the jury found the officers were executing an unlawful arrest at the time he offered the resistance. The People respond that the instructions were adequate because they defined what constitutes a lawful *detention*. (CALJIC Nos. 9.23, 9.27, 9.28, 9.29.) Reversal is not required.

Section 69 punishes any person "who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty." The People must prove, as an element of the offense, that the officer was engaged in the *lawful* performance of his or her duties when the resistance by the defendant was offered. (*In re Manuel G.* (1997) 16 Cal.4th 805, 816-818.)

The People's theory in this case was that after obtaining information about a possible criminal threat from Orozco, police officers attempted to detain appellant for questioning. He began harassing them verbally and then physically resisted an attempt to

pat him down for weapons, after which they arrested him because of his resistance. Consistent with this theory, CALJIC No. 9.23 advised the jury that a peace officer was performing his or her duties within the meaning of section 69 if he or she was "lawfully detaining or attempting to detain a person for questioning or investigation using reasonable force to effect a lawful detention." CALJIC No. 9.27 defined a "lawful" detention as requiring "probable or reasonable cause," and set forth the following grounds for a reasonable detention: "1. There must be a rational suspicion by the peace officer that some activity out of the ordinary has taken place, is occurring or is about to occur; [¶] 2. Some indication must exist to connect the person under suspicion with the unusual activity; and [¶] 3. There must be some suggestion that the activity is related to a crime." The jury was also instructed in CALJIC No. 9.26 that a peace officer was entitled to use reasonable force in detaining a suspect, but that a suspect was entitled to use reasonable force to resist if the force employed by the officer was excessive.

Appellant complains that these instructions were inadequate because the evidence supported a finding that the officers were executing an arrest, rather than a mere detention, when the resistance constituting the section 69 violation took place. He notes that an arrest requires probable cause to believe that a suspect has committed a crime, a standard that is harder to meet than the "reasonable suspicion" standard required for a detention or a "stop-and-frisk" for weapons. (*People v. Souza* (1994) 9 Cal.4th 224, 230-231; *People v. Gorrostieta* (1993) 19 Cal.App.4th 71, 82-83.) Appellant claims the officers did not have probable cause to believe he had committed a crime when they approached him, and that if their actions amounted to an arrest, the jury would have found that the lawfulness element of section 69 was not satisfied.

Temporary detentions "may, at some point, become so overly intrusive that [they] can no longer be characterized as a minimal intrusion designed to confirm quickly or dispel the suspicions which justified the initial stop." (*In re Carlos M.* (1990) 220 Cal.App.3d 372, 384.) A detention that exceeds the permissible scope of an investigative stop becomes a de facto arrest of the detainee, requiring probable cause. (*Ibid.*) When distinguishing permissible investigative detentions from impermissible de facto arrests,

we focus on "whether the police diligently pursued a means of investigation reasonably designed to dispel or confirm their suspicions quickly, using the least intrusive means reasonably available under the circumstances." (*Id*. at pp. 384-385.) Handcuffing a suspect and forcing him to lie on the ground does not necessarily convert a detention into an arrest. (*People v. Celis* (2004) 33 Cal.4th 667, 675.)

Here, the evidence did not support jury instructions on the theory that police were arresting appellant rather than detaining him when his resistance commenced. The only witness to testify about the encounter was Office Moevao, who maintained that he approached appellant to speak with him about the criminal conduct reported by Orozco and attempted to do a patdown search for his own protection. Up to that point, the encounter was clearly a detention for which only reasonable suspicion was required. The officers had reasonable suspicion to question appellant and pat him down for weapons based on their conversation with Orozco about appellant's threatening conduct. It was at this point that appellant refused to comply by swearing and assuming a combative pose. He continued to physically resist the officers and was eventually subdued, handcuffed and arrested, but by the time of arrest, the officers had probable cause to believe he had violated section 69.

Appellant argues that Officer Moevao's testimony on cross-examination supported a finding that the officers intended to arrest appellant from the moment they approached him. Moevau acknowledged that when appellant asked him, "What the fuck did I do," he interpreted the statement to mean "Why am I being arrested," but this was not an admission the contact actually was an arrest from its inception and did not contradict Moevao's testimony on direct that he initially approached appellant to detain him for questioning.

Appellant notes that the officers did not advise him of the reason he was being arrested at the scene and argues that this rendered their conduct unlawful. An officer need not inform a suspect of the grounds for the arrest when the person is actually engaged in the commission of a crime. (§ 841; CALJIC No. 9.26.) In any event, the officers' failure to advise appellant of the reason for his arrest at the scene does not

excuse his resistance at the time of the initial detention, before the arrest was effectuated.]]

C. Proof that Prior Assault was a "Serious Felony"

Appellant was sentenced to prison for eleven years, consisting of the three-year upper term on the criminal threats count, doubled under the Three Strikes law, plus a five-year enhancement under section 667, subdivision (a). Both the "strike" and the five-year enhancement were based on a 1992 conviction under section 245, subdivision (a)(1), which prohibits the commission of "an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury . . . ." Appellant contends the record does not support the trial court's finding that the prior assault qualifies as a serious or violent felony within the meaning of those sentencing provisions. We agree.

Section 667, subdivision (a) requires a five-year sentence enhancement when a defendant convicted of a "serious felony" offense listed in section 1192.7, subdivision (c) has been previously convicted of a serious felony. Section 1170.12, subdivision (c), the Three Strikes law, provides for a doubled sentence when a defendant convicted of any felony has been previously convicted of a serious felony.[3] Appellant's current conviction for criminal threats under section 422 is a serious felony and he is subject to both the five-year enhancement and a second strike sentence if his 1992 conviction is similarly classified.

The list of serious felonies under section 1192.7, subdivision (c) includes both specific, enumerated crimes and more generic descriptions of criminal conduct. Before the passage of Proposition 21 in 2000, section 245 was not among the crimes enumerated in section 1192.7, and a conviction under section 245 could qualify as a prior serious felony only if the defendant "personally inflict[ed] great bodily injury on any

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[3] The Three Strikes law also applies when a defendant convicted of a felony has been previously convicted of a violent felony under section 667.5, subdivision (c), but the violent felony provisions are not relevant to appellant's case.

person other than an accomplice," "personally use[d] a firearm," or "personally use[d] a dangerous or deadly weapon." (§1192.7, subd. (c)(8) & (23) (Stats.1993, ch. 611, §§ 18, 18.5, pp. 3545-3548); *People v. Rodriguez* (1998) 17 Cal.4th 253, 261.) Because a conviction under section 245, subdivision (a)(1) could result from aiding and abetting another in an assault committed with a deadly weapon, or from personally committing an assault by means which were *likely* to cause great bodily injury, but which did not involve the use of a weapon or actually result in great bodily injury, proof that the defendant suffered a conviction under section 245, subdivision (a)(1) was not itself enough to demonstrate the crime was a serious felony. (*Rodriguez*, at pp. 261-262.)

Proposition 21 added subdivision (c)(31) to section 1192.7's list of serious felonies: "assault with a deadly weapon, firearm, machinegun, assault weapon, or semiautomatic firearm or assault on a peace officer or firefighter, in violation of section 245. . . ." A conviction for assault *with a deadly weapon* under section 245, subdivision (a)(1) now qualifies as a serious felony whether or not the defendant was convicted as a direct perpetrator or as an aider and abettor. (*People v. Luna* (2004) 113 Cal.App.4th 395, 398.) But the amendment did not change the status of an assault *by means of force likely to produce great bodily injury*, the other variant of section 245, subdivision (a)(1). Even under the amended law, a conviction of assault by means likely to cause great bodily injury is not a serious felony unless it also involves the use of a deadly weapon or actually results in the personal infliction of great bodily injury. (*People v. Haykel* (2002) 96 Cal.App.4th 146, 148-149; *People v. Winters* (2001) 93 Cal.App.4th 273, 280; *Williams v. Superior Court* (2001) 92 Cal.App.4th 612, 622-624.)

During the court trial on the prior conviction allegations against appellant, the prosecution's only evidence regarding the nature of the 1992 assault conviction was a prison packet submitted under section 969b, which contained the abstract of judgment and a fingerprint card referencing the conviction. The abstract reflects a conviction for violating section 245, subdivision (a)(1), describes the crime as "ASSAULT GBI W/DEADLY WEAPON," and indicates that the conviction was the result of a plea rather than a trial. The fingerprint card described the conviction as "CT1 PC245(A)(1) ASSLT

GRT BDLY INJ W/DDLY WPN." These documents are completely silent on the question of whether appellant *personally* used a deadly weapon or *personally* inflicted great bodily injury, so the conviction does not qualify as a serious felony under section 1192.7, subdivision (c)(8) or (c)(23). The prior conviction may be treated as a serious felony only if we can say from the evidence presented that appellant was convicted of assault with a deadly weapon under section 1192.7, subdivision (c)(31), rather than an assault by some other means of force likely to produce great bodily injury.

The abstract of judgment is the only document among the evidence presented that was admissible to prove the nature of the offense itself. (See *People v. Ruiz* (1999) 69 Cal.App.4th 1085, 1090-1091; *People v. Williams* (1996) 50 Cal.App.4th 1405, 1411.) Its reference to the crime as "ASSAULT GBI W/DEADLY WEAPON" is ambiguous. Although the notation could be read to mean that the assault was committed both by means of force likely to produce great bodily injury *and* with a deadly weapon, it could also be construed as a shorthand description of the criminal conduct covered by section 245, subdivision (a)(1)--assault by means of force likely to product great bodily injury *or* with a deadly weapon.

A plea to a criminal statute punishing alternative types of conduct is insufficient to prove that the defendant committed *each* type of conduct. (*People v. Cortez* (1999) 73 Cal.App.4th 276, 283.) The abstract's description of the 1992 assault is ambiguous, and may simply be a reference to the statute itself. It is not substantial evidence--evidence that is "reasonable, credible and of solid value"--that a deadly weapon was in fact used during the commission of that offense. (See *People v. Garrett* (2001) 92 Cal.App.4th 1417, 1433.) To hold otherwise would improperly shift to the defense the burden of proof on the seriousness of the prior. (See *Cortez*, at pp. 283-284.)

We recognize that a contrary result was reached in *People v. Luna*, *supra*, 113 Cal.App.4th at pp. 398-399, which concluded that a similar reference in the abstract of judgment to "ASSLT GBI W/DL WPN" was sufficient to prove that a prior conviction under section 245, subdivision (a)(1) was an assault with a deadly weapon and was, therefore, a serious felony under section 1192.7, subdivision (c)(31). But we cannot be

confident that this abbreviated description of a statute prohibiting two types of criminal conduct was anything more than that particular court clerk's shorthand method of referring to the statute under which appellant was convicted.

In *People v. Rodriguez, supra*, 17 Cal.4th 253, as in this case, the defendant's sentence was enhanced after a court trial determining that a prior assault conviction qualified as a serious felony. The only evidence to support that allegation was an abstract of judgment showing a guilty plea to section 245, subdivision (a)(1) and describing the crime as "ASLT GBI/DLY WPN." (*Rodriguez*, at p. 261.) The court concluded that the abstract simply "reflected the statutory language" (*ibid.*) and "proved nothing more than the least adjudicated elements of the charged offense." (*Id*. at pp. 261, 262.) At the time, one could violate section 245, subdivision (a)(1) in two ways that would not qualify as serious felonies--either by aiding and abetting an assault without personally using a weapon or personally inflicting great bodily injury *or* by personally committing an assault by means likely to cause great bodily injury but without a deadly weapon. The Supreme Court therefore reversed the finding that the prior assault qualified as a serious felony, citing the rule that "'when the record does not disclose any of the facts of the offense actually committed, the court will presume that the prior conviction was for the least offense punishable . . . .'" (*Id*. at p. 262)

The language in the abstract from appellant's 1992 assault case cannot be meaningfully distinguished from the abstract in *Rodriguez*. Although the enactment of Proposition 21 means that an unambiguous reference to a conviction of assault with a deadly weapon will now suffice to prove a serious felony, regardless of the defendant's personal use of a weapon or personal infliction of great bodily injury, *Rodriguez* is still binding on the question of whether an abstract of judgment is sufficient to prove assault with a deadly weapon as opposed to assault by other means likely to cause great bodily injury.

The People suggest that we can uphold the finding on the prior conviction because (1) the probation report prepared in the current case describes the 1992 assault as an assault with a deadly weapon, and (2) defense counsel stated at sentencing that

appellant had used a car during the commission of the earlier assault, and a car qualifies as a deadly weapon. Both the probation report and counsel's statement involve multiple levels of hearsay and would not be admissible during a trial on the truth of the prior conviction allegation. In any case, they were not presented at the trial that was actually held and cannot be considered in evaluating the sufficiency of the evidence that was presented.

The true finding underlying the five-year enhancement and "strike" allegation cannot stand. Neither double jeopardy nor due process bars a retrial on the prior conviction allegation, and on remand, the People may present additional evidence to demonstrate that the 1992 assault was an assault with a deadly weapon or involved other conduct making that crime a serious felony. (See *People v. Barragan* (2004) 32 Cal.4th 236, 259; *People v. Monge* (1997) 16 Cal.4th 826, 839.) Such evidence must be limited to that contained in the record of conviction. (*People v. Reed* (1996) 13 Cal.4th 217, 226.)

DISPOSITION

The judgment of conviction is affirmed. The true findings on the prior conviction allegations under sections 667, subdivision (a) and 1170.12 are reversed and the sentence is vacated. The case is remanded for a retrial on the prior conviction allegations if the People so elect, or for a new sentencing hearing if the People do not go forward on those allegations.

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COFFEE, J.

We concur:

GILBERT, P.J.

PERREN, J.

Andrew C. Kauffman, Judge

Superior Court County of Santa Barbara

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